Supreme Court, U.S.
FILED

942078 MAY 3 - 1995

OFFICE OF THE CLERK

I

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1994
NO. _____

JOSEPH B. MONTOYA,
Petitioner,
vs.
UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOSEPH B. MONTOYA
REG. NO. 04500-097
FPC - BORON
P.O. BOX 1000
BORON, CA 93596-1000

24.00

QUESTION PRESENTED

WHETHER THE COURT OF APPEALS RENDERED A DECISION IN CONFLICT WITH DECISIONS OF THIS COURT AND OF OTHER COURTS OF APPEALS, WHEN IT DENIED PETITIONER'S APPEAL ON THE ISSUE OF AN ENHANCEMENT OF HIS SENTENCE BY TWO POINTS FOR OBSTRUCTION OF JUSTICE.

PARTIES

The Petitioner is Joseph B. Montoya, an inmate in the Federal Bureau of Prisons.

The Respondent is the United States of America under an original action from the Eastern District of California and is represented by the Solicitor General of the United States of America.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	(i)
PARTIES	(i)
TABLE OF AUTHORITIES	(iii)
DECISIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	3
ARGUMENT IN SUPPORT OF GRANTING CERTIORARI	6
CERTIFICATE OF SERVICE	12
APPENDIX:	
Decision of the United State Court of Appeals	A.1
Order of the United States District Court	A.2

TABLE OF AUTHORITIES

Cases:	Pages:
United States v. Brett, 872 F.2d 1365 (6th Cir.1992).....	10
United States v. Burnette, 981 F.2d 874 (6th Cir.1992).....	9
United States v. Dunnigan, 122 L.Fd.2d 445 (1993).....	6, 8
United States v. Lato, 934 F.2d 1080 (9th Cir.1991).....	11
United States v. Lofton, 905 F.2d 1315 (9th Cir.1990).....	8
United States v. Rubio-Topete, 999 F.2d 1334 (9th Cir.1994).....	8
United States v. Ward, 914 F.2d 1340 (9th Cir.1990).....	8

Statutes and Rules:

18 U.S.C. 1254(1).....	2
18 U.S.C. 3553(c)(1988).....	2
18 U.S.C. 3742(e)	2
U.S. Sentencing Guidelines.....	passim

IN THE

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1994
NO. _____

JOSEPH B. MONTOYA,)
)
Petitioner,)
)
vs.)
)
UNITED STATES OF AMERICA,)
)
Respondent.)

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DECISIONS BELOW

The decision of the United States Court of Appeals for the Ninth Circuit is an unpublished memorandum decision and a copy is attached hereto as Appendix A (A.1). The order of the United States District Court is not reported and a copy is attached hereto as Appendix B (A.2).

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on February 2, 1995. Jurisdiction is conferred by 28 U.S.C. Section 1254(1).

STATUTORY PROVISIONS INVOLVED

The case involves the improper enhancement of Petitioners's sentence in violation of the United States Sentencing Guidelines ("Guidelines") Section 3C1.1; Title 18 U.S.C. Code Sections 3553(c)(1988), 3742(e); and relevant case law as cited herein which directs that the sentencing judge shall make specific findings in open court the reasons for its imposition of the sentence and to make a clear finding that the defendant has intentionally lied with respect to testimony given under oath or the defendant willfully concealed evidence to willfully impede or obstruct the administration of justice.

STATEMENT OF THE CASE

The petitioner requests a review of the appellate court's affirmation of the district court's decision in the enhancement of his sentence of two levels for obstruction of justice under Guidelines Section 3C1.1 as the courts did not follow their own relevant circuit case law. There are differences in the standards between circuits for the specific finding for obstruction of justice under Section 3C1.1 which also conflicts with relevant authority as handed down by this Court on decisions in this regard.

On May 17, 1989, an indictment was filed charging violations of the RICO statute, the Hobbs Act, bribery and money laundering. Petitioner was arraigned on June 12, 1989 and entered a plea of not guilty to all counts.

On October 10, 1989, a 12 count superseding indictment was filed. Petitioner was arraigned on this indictment on November 2, 1989.

Petitioner was convicted, after a jury

trial, on Counts One, Two, Four, Six, Seven, Eight, and Nine and found not guilty on Counts Five, Ten, and Eleven. The Trial Court entered a Judgment of Acquittal on Counts Three and Twelve. Petitioner made a motion for a new trial which was denied by the court.

On April 26, 1990, petitioner was sentenced under the Guidelines to the custody of the Attorney General for 78 months on Counts One, Two and Four. He was also sentenced to 78 months on Counts Six, Seven and Eight to run concurrently with the sentence on Counts One, Two and Four. Appellant was fined $32,000 and restitution was ordered in the amount of $8,000.

On September 16, 1993, petitioner was before the court for resentencing following the reversal of Count Two, a Hobbs Act violation and four Counts of Extortion pursuant to the Ninth Circuit's remand to the District Court.

The remaining counts before the court for resentencing were Count One, A RICO count, and Count Four, a money laundering count.

The offense level, under the Guidelines, on Count One [the RICO count], was level 24. The offense level on Count Four, the money laundering count, was level 25.

The trial court found that the adjusted offense level of 26 with a criminal history category I, generated a Guideline range of 63 to 78 months, supervised release of 3 to 5 years, and a fine range of $12,500 to $125,000.

Pursuant to those findings, the court sentenced petitioner to a term of 72 months of imprisonment. A Modified Judgment Including Sentence was filed on September 22, 1993.

On September 21, 1993, petitioners filed Judgment Including Sentence entered on September 16, 1993.

On February 2, 1995, the United States Court of Appeals for the Ninth Circuit, in a unpublished Memorandum decision [Docket No. 93-10614, exhibit "A"] affirmed the decision of the District Court on the Obstruction of Justice.

Petitioner has now made a timely petition

for review by this Court.

Petitioner is currently imprisoned at the Federal Prison Camp, Boron, California.

ARGUMENT IN SUPPORT OF GRANTING CERTIORARI

A. Conflicts with decisions of this court

This Court in United States v. Dunnigan, 122 L.Ed.2d 445, 449 (1993) held that "Upon a proper determination that the accused has committed perjury at trial, a court may enhance the accused sentence under Section 3C1.1." This Court went on to say that a district court must review the evidence and make independent findings necessary to establish that the defendant committed perjury by addressing each element of the alleged perjury in a clear and distinct finding. Dunnigan, at 454, supra. The same should hold true for any suppression of physical evidence.

In the lower court there was never a clear and distinct finding of each incident leading to the alleged perjury only a "impression" by the

trial judge without specificity in any manner. It should be noted here that Obstruction of Justice was not found in the original sentencing of petitioner. Additionally, the one document which the petitioner was alleged to have tried to suppress was in the hands of the government at all times and simply "used" as an enhancement device in resentencing. The government did not labor under a misapprehension or spend additional manpower as a result of not having this document which is borne out by the record below as set forth in Guidelines Section 3C1.1 and relevant case law.

B. The Circuits are not together in the application of Obstruction of Justice enhancement under the Guidelines Section 3C1.1

The opinions of the Courts of Appeal for the various circuits are varied as to the duty of the court to make independent findings of the enhancement for Obstruction of Justice under Section 3C1.1.

The Ninth Circuit in United States v.

Rubio-Topete, 999 F.2d 1334, 1341 held that 'if a defendant objects to a sentence enhancement resulting from her trial testimony, a district court must review the evidence and make independent findings necessary to establish a willful impediment to or obstruction of justice, or an attempt to do the same, under perjury definition.' (citing Dunnigan, supra at 454). See also United States v. Lofton, 905 F.2d 1315 (9th Cir.1991). The district court never made independent findings and the Appellate Court did not find on the record which shows the trial judge did not find on the issues at the time of the trial, but had an impression at a later resentencing that he had committed perjury, which has no standing under the perjury standards of 18 U.S.C. Section 1621. See United States v. Ward, 914 F.2d 1340 (9th Cir.1990).

The Sixth Circuit has held "that justice was obstructed where the judge makes a *specific finding* that a defendant lied." (emphasis added) United States v. Burnette, 981 F.2d 874, 879

(6th Cir.1992).

The Seventh and Eleventh Circuits have held that enhancing a sentence 'without a finding by the judge that he lied about a material subject, or the clear implication of the jury's verdict that he must have done so . . . .' violates the Guidelines. In the instant matter, the jury acquitted on 3 counts, the trial court gave judgments of acquittal on two counts and five counts were reversed by the Ninth Circuit court leaving two counts out of 12 intact and affirmed on appeal. This does not indicate a clear record of perjury or suppression of evidence and the court only had an impression of perjury, not a specific finding that the defendant willfully obstructed justice in either case. The Appellate Court made a clear error in upholding the district court's decision on appeal.

Also, the one--2 page document (out of the over 60,000 documents requested by the government over an 18 month period)) was in the government's hands when it was requested and was

not intentionally withheld by the defendant as the record shows. The government had the original document in question having received it from the addressee. Petitioner's staff was charged with finding the document, had trouble locating it and petitioner was not aware of his staff's problems with any documents. Petitioner's staff attested to this at trial and it is on the record below. The Eighth Circuit has held it is appropriate to enhance a defendant under section 3C1.1 when a defendant's conduct has a material effect on the government's investigative efforts, or if the government has 'lost time, manpower, and money because it was laboring under a misbelief.' United States v. Brett, 872 F.2d 1365, 1372-73 (8th Cir. 1989). The government lost no time, money or manpower and was not laboring under a misbelief as it had the one document in question when it requested it, and the alleged perjured testimony did not create any of the foregoing circumstances either as set forth in Brett,

supra. See also United States v. Lato, 934 F.2d 1080 (9th Cir.1991).

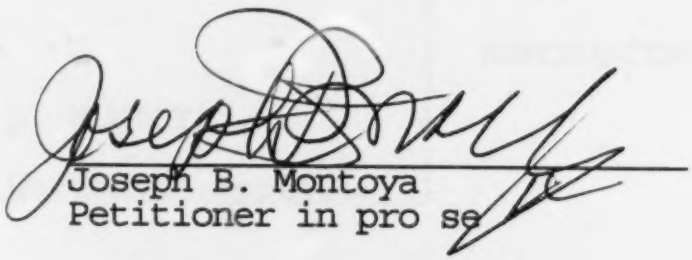
It should be noted, and it is supported by the record below, that the United States Attorney made the request for obstruction of justice at time of sentencing without warning or notice to defendant leaving defendant defenseless as to support by case records at time of sentencing. At the time of sentencing, the district court had no record before it to review before imposing this enhancement.

C. Conclusion

Certiorari should be granted because the District Court's and the Court of Appeals' approach to the enhancement of a sentence for obstruction of justice under Guidelines Section 3C1.1 is contrary to the decisions of this Court in Grayson and Dunnigan and the circuits are at odds with this decisions of the courts in this matter. This case provides the proper vehicle for determining the proper guidelines for enhancement of sentences under Guidelines

Section 3C1.1 for clarity and uniformity for all circuits to follow and the enhancement for obstruction of justice in the Judgment below should be reversed.

Respectfully submitted,

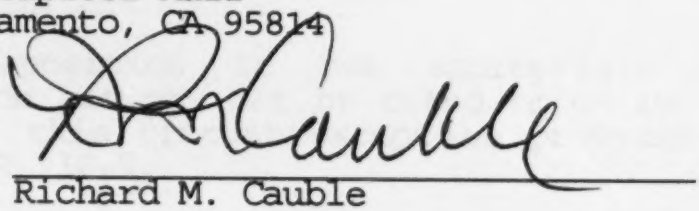


Joseph B. Montoya
Petitioner in pro se

CERTIFICATE OF SERVICE

I hereby certify that on the 3th day of June, 1995, a true and correct copy of the foregoing Petition for Writ of Certiorari with Appendix attached was mailed, postage prepaid, to the following:

John K. Vincent
Assistant U.S. Attorney
650 Capitol Mall
Sacramento, CA 95814



Richard M. Cauble

APPENDIX A.1

NOT FOR PUBLICATION

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	)	No. 93-10614
	)	
Plaintiff-Appellee,	)	DC No. CV-89-199
	)	-01-ML
	)	
v.	)	MEMORANDUM*
	)	
JOSEPH B. MONTOYA,	)	
	)	
Defendant-Appellant.	)	

Appeal from the United States District Court
for the Eastern District of California
Milton L. Schwartz, District Judge, Presiding
Submitted January 13, 1995**
San Francisco, California

Before: ALDISERT,*** CHOY and SCHROEDER, Circuit Judges.

---

*This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

**The panel finds this case appropriate for submission without argument pursuant to Fed.R.App.P. 34(a) and Ninth circuit Rule 34-4.

***Honorable Ruggero J. Aldisert, Senior United States Circuit Judge from the Third Circuit, sitting by designation.

Joseph B. Montoya appeals his 72- month imposed after remand. He contends that the district court erred when, pursuant to U.S.S.G. Section 3C1.1, it increased his offense level by two points for obstruction of justice.

The district court found that Montoya obstructed justice by two different means. First, he deliberately attempted to keep evidence from discovery and then he intentionally testified falsely at file. The district court's judgment should be affirmed summarily if either ground is supported. See United States v. Hernandez-Valenzuela, 932 F.2d 803, 805 (9th Cir. 1991)(reversal not required where obstruction of justice is proper on at least one ground). Montoya does not seriously contest the district court's finding that he deliberately attempted to keep the evidence from discovery. The finding is not clearly erroneous and is supported by the

record that Montoya belatedly produced materially incriminating evidence, including a "schedule of fees" tending to show that Montoya exacted contributions as quid pro quo for legislation.

The finding of perjury is also supported. An obstruction of justice adjustment is proper so long as the district court finds that defendant committed all the elements of perjury under the federal criminal perjury statute, 18 U.S.C. Section 1621. See United States v. Dunnigan, 113 S.Ct. 1111, 1116-17 (1993).

In the remand sentencing we now review, the district court relied on its original finding of obstruction of justice in 1990. As part of that original finding, the district court noted:

> ... I went through this to determine whether I believed conscientiously a finding of obstruction of justice was warranted, and the first thing any judge looks at is did the defendant, when he or she voluntarily took the witness stand, lie deliberately under oath, commit perjury in material

> particulars, and in more than what could be resolved as inadvertence or mistake or an immaterial matter.

(RT 3887). Applying that standard, the district court concluded that Montoya had intentionally testified falsely:

> [A]s I sat through those weeks of trial; and listened to every witness, my decision to make a finding of obstruction of justice is based upon cold facts that I believe were testified to that were intentionally false. I think there were a number of them.

(RT 3888).

The district court's findings encompassed all of the factual predicates for a finding of perjury under the statute and are not clearly erroneous.

Montoya finally contends that an obstruction of justice based on trial testimony impermissibly chills his right to trial by jury. The Supreme Court has expressly rejected this argument in Dunnigan, 113 S.Ct. at 1117, and United States v. Grayson, 438 U.S. 41, 54-55 (1978). See also, United States v. Barbosa, 906 F.2d 1366 (9th

Cir.). "There is no protected right to commit perjury." Grayson, 438 U.S. at 54.

AFFIRMED

APPENDIX A.2

UNITED STATES DISTRICT COURT

Eastern District of California

UNITED STATES OF AMERICA Case No. CV-S-89-0199-01 MLS

V.

JOSEPH B. MONTOYA

JEREMIAH F. HALLISEY
Attorney at Law
Defendant's Attorney
300 Montgomery Street
San Francisco, CA 94104

MODIFIED

JUDGMENT INCLUDING SENTENCING
UNDER THE SFNTENCING REFORM ACT

THE DEFENDANT:

[X] Was found guilty on counts one (1) and four (4) after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such counts, which involve the following offenses:

18 U.S.C. 1962(C)	Conducting Affairs of an Enterprise Through a Pattern of Racketeering	Ct 1
Date of Offense: 1981-1988		
18 U.S.C. 1956	Money Laundering	Ct 4
Date of Offense: 1988		

The defendant is sentenced as provided in pages 2 through 5 of this Judgment. the sentence is imposed pursuant to the Sentencing Reform Act of 1984.

[X] The fine imposed by this Judgment is $32,000. Any interest shall be waived.

[X] Restitution imposed by this Judgment is in the amount of $8,000.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of residence or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid.

Defendant's Soc. Sec. Number: 563-50-7344

Defendant's mailing address: Federal Custody

Defendant's residence address: Federal Custody

September 17, 1993
Date of Imposition of Sentence

_____
Signature of Judicial Officer

Milton L. Schwartz, USDC Judge
Name and Title of Judicial Officer

September 22, 1993
Date

Defendant: JOSEPH MONTOYA
Case Number: CR-S-89-0199-01 MLS

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of:

Seventy-two (72) months

[X] The defendant is remanded to the custody of the United States Marshal.

RETURN

I have executed this Judgment as follows:

Defendant delivered on to
at
with a copy of this certified Judgment

United States Marshal

By
Deputy Marshal